STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-v-

JUSTLY ERNEST JOHNSON,
Defendant.

Supreme Court No. 154128
Court of Appeals No. 311625
Trial Court No. 99-005393-01

On Appeal From The Court Of Appeals
Deborah Servitto, P.J.; Henry Saad, J; Coleen O'Brien, J.

DEFENDANT-APPELLANT JUSTLY JOHNSON'S BRIEF ON APPEAL

****Oral Argument Requested****

(Submitted Concurrently with the Brief on Appeal in Companion Case, *People v Kendrick Scott*, Supreme Court No. 154130)

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STATEMENT OF JURISDICTION

Defendant-appellant Justly Johnson appeals from the unpublished May 31, 2016, Court of Appeals opinion affirming the Wayne County Circuit Court's August 7, 2015, Order denying relief from judgment (after a remand from this Court for an evidentiary hearing).

Mr. Johnson filed a timely application for leave to appeal in this Court, which this Court granted on November 1, 2017. This Court has jurisdiction pursuant to MCR 7.303(B)(1).

STATEMENT OF QUESTIONS INVOLVED

I. Where the only eyewitness ever presented in this case, the victim's own son, testified at a post-conviction evidentiary hearing that he saw the shooter and it was not Mr. Johnson or his co-defendant Kendrick Scott, did the trial court abuse its discretion by declining to order a new trial under *People v Cress*?

The Trial Court would answer, "No."
The Court of Appeals answered, "No."
The Defendant-Appellant answers, "Yes."

II. If the claims of new evidence that Mr. Johnson litigated in a prior motion for relief from judgment are barred under MCR 6.508(D)(2), should the evidence upon which those claims were based still be considered in weighing the materiality of the new eyewitness evidence now before the Court?

The Trial Court did not answer.
The Court of Appeals answered, "No."
The Defendant-Appellant answers, "Yes."

III. If relief is not warranted under *Cress*, did trial counsel render constitutionally ineffective assistance by failing to even seek to interview the victim's son or call him as a witness at trial?

The Trial Court answered, "No."
The Court of Appeals answered, "No."
The Defendant-Appellant answers, "Yes."

BRIEF STATEMENT OF THE CASE

CJ Skinner was seated in the front passenger seat of a minivan when his mother was fatally shot as she reentered the car on the driver's side. No one obtained Skinner's eyewitness account until 12 years after the 1999 trial. In 2014, this Court remanded for an evidentiary hearing to build a record of Skinner's newly-discovered account. At that hearing, Skinner testified unequivocally that he saw his mother's shooter, and he is absolutely sure that the perpetrator was neither Justly Johnson nor co-defendant, Kendrick Scott.

Skinner is the first eyewitness ever presented in this case. The prosecution's case at trial consisted only of wavering hearsay accounts from two young men who were themselves in custody and threatened with prosecution for the murder in question. The accounts these men gave have not only been recanted, but have actually been shown to be verifiably false. Moreover, evidence has emerged since trial that the victim's husband had a history of serious domestic violence against her. Even the circuit judge presiding over the remand hearing was convinced that the husband likely set his wife up to be killed—as the record of this case simply does not support a conviction of attempted robbery/felony murder, which was the only theory of guilt presented to the factfinder at trial. Under the circumstances, the trial court clearly abused its discretion in declining to order a new trial in this case. Indeed, Justice Kurtis Wilder, sitting on a Court of Appeals panel reviewing this case, **indicated that he would have peremptorily reversed the trial court** and remanded for a new trial. 280a.

The courts below abused their discretion in denying relief in this case. The only eyewitness, the victim's own son, has exculpated Mr. Johnson and Mr. Scott. Moreover, the convictions in this case were obtained only under an attempted robbery/felony murder theory. Indeed, the prosecutor at trial affirmatively argued against a finding of intent to kill. Thus, if a judge finds (as the trial judge found here after the 2015 evidentiary hearing) that the record of

this case no longer supports an attempted robbery, it is an abuse of discretion to deny relief from judgment.

When the full record of this case is properly considered, it is clear that Mr. Johnson and Mr. Scott are innocent men who have spent 18 years in prison for a crime they did not commit. This Court should reverse and remand this case for a new trial.

STATEMENT OF FACTS

a. *THE CRIME*

This case stems from the May 9, 1999, murder of Lisa Kindred in the presence of her three children, the oldest of whom was 8-year-old Charmous Skinner, Jr. ("CJ").

Earlier that night (the evening of May 8), Lisa, her children and her husband, Will Kindred, had gone to a drive-in movie in Dearborn. 82a. On the way home, Will suddenly announced that, instead of going straight home to Roseville, they would make a stop on Detroit's East Side to talk to a relative. 82a-83a, 88a, 90a. Even though it was very late at night, Will claimed he was making the unannounced trip in order to discuss purchasing a motorcycle from his sister's boyfriend, Verlin Miller. 83a-84a.

Upon arriving, Lisa parked the van outside Will's relatives' house on Bewick Street, and Will went inside. 83a. Lisa waited outside in the car on the deserted street with three children (including a newborn). 82a-83a. At one point, Lisa went to the door of the house and asked Will to come back to the car. 89a. Will told her that he would be out shortly. 89a. Soon afterward, he heard a noise, like a car door slamming, and went to the front door just in time to see Lisa's van speeding away. 84a-85a, 91a.

Will did not pursue the fleeing car containing his wife and kids but instead chased an unknown person on foot through a field, failing to catch him. 84a-86a, 91a. Lisa's van stopped at

a nearby gas station, and she staggered out and collapsed. 79a, 86a-87a, 94a. She had a single gunshot wound from a .22 caliber weapon, and she died shortly afterward. 92a, 99a-100a.

b. *THE INVESTIGATION AND TRIAL*

In the immediate aftermath, police stated that there "was a strong possibility that Kindred knew her assailant" and stressing that "she was not involved in a carjacking." M.L. Elrick, *et al.*, *Mom Is Shot, Saves Her Children, Dies*, DETROIT FREE PRESS, May 10, 1999. Nevertheless, the investigation and prosecution did not focus on Will Kindred. Although he had a long and significant history of domestic violence against the victim, and police had confiscated .22 caliber weapons from him in the past (see evidentiary hearing facts below), none of this information about Will's violent background came out at trial.

Instead, the investigation centered on two people arrested near the scene, Antonio Burnette and Raymond Jackson. Both were very intoxicated on alcohol, illegal narcotics and/or prescription medications on the night of the murder. 61a, 64a-66a, 71a, 75a-76a, 109a-110a, 127-128, 131a; 144a, 149a-151a.[1] And both asserted that they were questioned aggressively by the police and made to fear that they would themselves be charged with the murder if they did not implicate others. 62a-63a, 67a-68a, 72a-74a, 111a, 129a-130a, 132a, 152a-153a.

The accounts of Burnette and Jackson were the only evidence that implicated either Mr. Johnson or Mr. Scott. Neither witness actually saw the crime, but they testified to statements Mr. Johnson and Mr. Scott allegedly made and to events they supposedly witnessed after the crime.

Burnette claimed that both defendants spoke with him in the hours after the crime and confessed to attempting to rob the victim before shooting her. 104a-106a, 118a, 142a, 146a, 148a. He asserted that this conversation began around 2:30 a.m. and went until 4:30 a.m. 56a,

[1] Mr. Johnson and Mr. Scott were tried separately. Citations to the co-defendant's transcript are included in this brief where they help establish consistency or contradiction. The cited portions of the co-defendant's transcript are included in the Appendix.

58a, 67a, 103a, 116a, 143a, 147a. He also stated that he saw both defendants pass guns to their girlfriends, claiming to have seen Mr. Johnson do so the night of the murder, and Mr. Scott the morning after at about 7:00 or 8:00 a.m. 59a, 60a, 107a-108a, 112a-113a, 114a-115a, 117a.

Jackson testified that Mr. Johnson had told him he had "hit a lick" and messed up and "had to shoot." 120a, 121a. At the time of his testimony, Jackson was staying at a hospital for "mental difficulties," 50a-51a, and was taking many medications for his mental condition. 69a, 70a, 71a. He admitted that he heard voices that were not real and had trouble distinguishing the real from the imagined. 122a, 129a-130a, 133a-134a.

c. *CONVICTION, APPEALS AND REMAND FOR HEARING*

Mr. Johnson was tried and convicted at a bench trial before Judge Prentis Edwards in January 2000. After the conclusion of direct appeals and prior post-conviction proceedings, the Michigan Innocence Clinic began representing him in 2011 and filed the underlying motion for relief from judgment. After Judge Edwards denied the motion without a hearing and the Court of Appeals denied leave to appeal, this Court remanded this case, along with Mr. Scott's case, for an evidentiary hearing. *People v Johnson*, 497 Mich 897; 855 NW2d 749 (2014).

Mr. Johnson and Mr. Scott filed a motion seeking the recusal of Judge James Callahan for the hearing on remand. They argued that Judge Callahan—who had denied Mr. Scott's 2013 motion for relief from judgment without a hearing—had already prejudged the credibility of CJ Skinner. Thus, the issues on remand, which called on the factfinder to judge anew Skinner's credibility, should be decided by a new judge. Judge Callahan declined to recuse himself. 158a. The joint evidentiary hearing was held before Judge Callahan on April 8; April 15; May 15; and May 27, 2015, and the judge orally denied relief from judgment on August 7, 2015. 267a-279a.

d. *THE WITNESSES AT THE 2015 EVIDENTIARY HEARING*

Charmous Skinner, Jr., ("CJ"), Lisa Kindred's son, was born on September 24, 1990

(making him 8 years and 8 months old when his mother died). 213a. CJ was close to his mother, and he lived with her his whole life until her death. 214a. He lived in Michigan from the time he was 3 until his mother died. 213a. At the time she was killed, CJ lived with his mother, her husband Will, and two younger children in Roseville. 213a, 240a.

CJ recalled that his mother's murder occurred in the early morning hours (just after midnight) on Mother's Day. 215a. He and his family had gone to a drive-in movie earlier that night, and then they made a stop in Will's family's neighborhood on the way home. 215a. CJ recalled that his mother was driving, which is consistent with Will's testimony from trial. 215a, 88a. Upon arrival, Will got out of the car and went into a house, while Lisa and the children waited in the car. 216a. CJ was initially in one of the back seats of the minivan, but he moved up to the front passenger seat after Will left. *Id*.

As they waited in the car for Will to return, CJ noticed that his mother was agitated and impatient. 216a-217a. At one point she left the car, walked up to the house, and knocked on the door. 217a. There was a brief conversation at the door, and then his mother returned to the car. *Id.* CJ's recollection is corroborated by the testimony of Will Kindred and Verlin Miller. *E.g.* 54a-55a, 84a-85a, 93a, 95a-96a, 137a-139a, 140a-141a.

As his mother returned to the van, opened the door, and began to climb inside, CJ saw a man behind her. 218a. He affirmed that he saw the man's face well enough to give a description and is "positive [he could] identify him." 218a-219a, 239a. CJ described the man as African-American, mid-30s, with very short hair, a beard, and a big nose. 218a. His gaze was drawn to the man's face, which was visible because the interior car light turned on as his mother opened the door. 219a, 239a. CJ could see that the man was behind his mother and off to the side. 219a, 232a, 233a. CJ drew a diagram at the hearing, which shows his mother getting in the driver's side of the car with the car door open and a man behind his mother off to the side. 252a.

At this point, CJ noticed no other people in the street; the man was alone. 219a-220a. No words were spoken between the man and CJ's mother, and the man did not attempt to take anything from her or from the van. 220a, 244a. With the man "damn near," "maybe six inches" behind his mother, with the door in between her and the man as she climbed back in the van, CJ heard a loud bang, and the driver's side window shattered. 220a, 232a-234a, 243a. After the bang, his "mother got in the car and raced off to the nearest gas station, got out, fell out, and died." 221a. CJ recalled hearing just one gunshot, 249a, which corresponds with the medical examiner's opinion that his mother was shot one time, and likely through an intermediate object (glass), which resulted in other minor wounds in addition to the one gunshot. 52a-53a.

CJ recalled that, at the gas station, his mother got out of the car, took ice out of the cooler they had in the van, and then collapsed. 221a, 245a. At that point, he retreated to the back of the van and began screaming and crying with his siblings. 221a, 247a. He recalled the police and an ambulance arriving shortly afterward. 221a, 245a-246a. He was taken to Will's mother's house later in the night. 246a. The next morning, CJ woke up and looked for his mother, only to be told by Will's mother that she was dead. 221a-222a.

CJ went to his mother's funeral, and he presented the Mother's Day card he had made for her at school. 222a. Sometime after the funeral, CJ moved to Pennsylvania to live with the family of his biological father. 222a-223a, 248a.

CJ was not interviewed by any police officers or lawyers in the aftermath of his mother's death. 222a. His family in Michigan also never asked him about the event. *Id.* CJ made clear, however, that he would have cooperated if the police had questioned him about what he had seen or asked him to identify the shooter from a lineup. 223a, 237a-238a. CJ indicated that he did not want to talk about the event with his family in the years that followed, but he is very interested in seeing his mother's killer punished. 223a-224a, 231a. Because they did not reach out to him, CJ

assumed that the police "had everything handled, everything figured out," and he did not think they needed his help to solve the case. 224a.

Years later, in August 2011, CJ received a letter inquiring about his mother's murder from investigative reporter Scott Lewis. 224a-225a. He wrote back, indicating that he had seen the man who shot his mother and felt confident he could identify him, and he offered to look at a photo lineup. 225a-226a. CJ's letter to Lewis concluded with: **"I will never forget the person's face, and if it is him, I will testify against him. But if it's not, I would not mind testifying on his behalf."** 226a (emphasis added). CJ then spoke on the phone with Lewis and discussed what he saw on the night of his mother's death, giving Lewis a description of the shooter. *Id*. Lewis was the first person to whom CJ revealed his firsthand account of the shooting. *Id*.

After speaking with Lewis, CJ was contacted by the Michigan Innocence Clinic. 229a. He spoke with law students from the MIC over the phone, and then met with them in person in late 2011. *Id.* At the meeting, he was shown a photo lineup. *Id.* He said that the person he saw outside the car the night his mother was shot was not in any of the photos. 230a. Indeed, CJ indicated that he was "a hundred percent" sure that none of the men in the photos was the perpetrator. *Id.* CJ said that he had never previously seen pictures of the men convicted for killing his mother. *Id.* He had never lived in the neighborhood where his mother was killed, and he did not know the men convicted for her murder. 231a.

CJ made clear that his main interest is to see his mother's killer punished. *Id.* **He reiterated that he is "positive" that he would recognize the shooter if he saw him, and he affirmed in court that the perpetrator was neither Mr. Johnson nor Mr. Scott.** *Id.*

CJ was incarcerated at the time Lewis contacted him because he had lied to protect his best friend. 228a. However, he would never lie to protect someone he does not know, and he certainly would tell the truth to implicate his mother's killer. 230a-231a.

Dr. Katherine Rosenblum is a licensed clinical psychologist and a research scientist at the University of Michigan Medical School. 255a-256a. She has a dual Ph.D. in Clinical and Developmental Psychology and has worked extensively with children of all ages. 256a-257a. Dr. Rosenblum specializes not only in developmental psychology ("the study of how and why people change over the course of the life span"), but also in children who have experienced trauma. 256a-257a. Dr. Rosenblum was qualified as an expert in clinical and developmental psychology with a particular focus on children. 258a.

Dr. Rosenblum was asked to provide a professional opinion about CJ. 258a-259a. She never met CJ, but she did review his affidavit and letters, as well as a memo summarizing the case. 263a. Being asked to render a professional opinion in this manner was not unusual for Dr. Rosenblum: In her day-to-day clinical work, she is routinely asked to consult about and give opinions on people she has not evaluated in person. 259a.

Dr. Rosenblum was specifically asked for her opinion on whether "it would be reasonable [and consistent with her clinical experiences] for someone to witness a traumatic event, not speak of it for a period of years, and then eventually start talking about it." *Id.* She first stated that an 8-year-old who saw a traumatic event would be certainly mature enough to take it in and have clear memories of it. 259a-260a. She then noted that it is very common for children who have experienced traumatic events to avoid talking about them: such avoidance is "actually a cardinal symptom." 261a, 264a, 265a. Family members will often avoid asking about these events in the immediate aftermath to minimize trauma and stress. 260a-261a.

Dr. Rosenblum also noted that research suggests a "narrowing of attention" in moments of high traumatic stress that leads people to "focus on and remember very clearly particular details . . . to the exclusion of some other more peripheral details." 260a. These memories are also very resilient. 264a. When asked whether "because of the passage of time . . . exaggeration

at times enter[s] into the picture," she responded that can happen with some memories, but such exaggeration is less likely with memories of especially remarkable events and memories made in a moment of high traumatic stress. *Id.*

Despite years of avoidance, it would be reasonable for the person who experienced the trauma to one day choose to start talking about it, particularly "under different circumstances." 261a. "Maturity and greater distance from the event" could account for someone's decision to speak up after many years of avoidance. 262a. A person who is avoiding discussion of a traumatic event is more likely to speak about it in response to direct questions, as opposed to going out of his way to offer information. 266a.

Christiana Signs (formerly Christiana Schmitz) worked on Mr. Johnson's and Mr. Scott's cases as a student in the Michigan Innocence Clinic during the 2011-12 academic year. 175a-177a. Signs now lives in Philadelphia and is a labor/employment attorney with the law firm of Greenberg Traurig. 176a.

Signs learned from Scott Lewis that CJ was a potentially helpful eyewitness in this case. 177a-178a. When Signs spoke with CJ on the phone in October 2011, he gave a description of the shooter. 179a. Signs then visited CJ in Pennsylvania to obtain further details and to administer a photo lineup. *Id.*

The directions given to CJ in advance stated: "The person who you saw on the night of the murder of your mother, Lisa Kindred, may or not be in a picture in the photo array that you are about to view." 185a. For each of the 20 photos, CJ was asked the question: "Do you recognize the person in the picture as the person you saw outside the van when your mother was shot?" 187a. CJ answered "no" for every photo. 190a.

In creating the photo lineup, Signs sought to present CJ with photos of Mr. Johnson and Mr. Scott from the time of the crime. 182a. She therefore used photos of the defendants from

1999, and the filler photos were taken from the Michigan Department of Corrections online offender database. *Id.* All 20 photos were cropped so as to remove backgrounds and were then pasted to index cards to be held up for CJ in the identification procedure. 183a.

Prior to conducting the lineup, Signs researched best practices, such as double-blind and sequential lineups. 179a-180a, 187a-189a. She used a double-blind method to ensure she did not influence CJ as he viewed the photos. 186a. When she held up the cards, only the number on the back was visible to her (and her colleagues). 187a-188a. She did not know which photo each number referred to and thus had no idea if she was holding up a photo of one of the defendants or one of the fillers. 187a-188a, 189a. The photos were shown to CJ one at a time. 189a.

Scott Lewis is a licensed private investigator and a former investigative reporter with decades of investigative experience. 199a-200a. Lewis began looking into the murder of Lisa Kindred in the fall of 2009 after he received a letter from Mr. Johnson. 201a. As part of his review of the case, he consulted Detective Michael Carlisle, a retired Detroit homicide investigator. 202a-203a. Carlisle reviewed the case materials and was featured in Lewis's news stories about the case. 203a. After consulting with Carlisle, Lewis continued investigating the case, as he "was astounded that the police didn't investigate the husband." *Id*.

As Lewis continued reviewing the case materials, he "realized that there was no reference to the police ever questioning CJ Skinner." 204a. Knowing CJ would have been 8 years old at the time of the crime, Lewis became interested in obtaining his account. 204a-205a. Locating CJ "was very difficult and time consuming." 206a.

Antonio Burnette, one of the only two inculpatory witnesses to testify at the defendants' trials, recanted that testimony at the evidentiary hearing. 159a-160a. Burnette made clear neither defendant confessed to robbing or shooting a woman, and he did not see either of them with a gun on the night of the shooting or the next day. 159a-160a.

Burnette testified that at the time of the murder, he was a minor, intoxicated, and was afraid of the police. 160a-161a, 171a. He had been with Mr. Johnson on the night of the murder, and he knew that the police regarded Mr. Johnson as a suspect. 161a, 171a. Therefore, he was afraid that he himself would be charged with the murder if he did not say what the police wanted to hear. 160a-161a, 164a, 169a-170a, 172a-173a. This is consistent with what Burnette said in his original testimony—that he inculpated Mr. Johnson and Mr. Scott out of fear for himself. 62a-63a, 67a. Burnette was never threatened by Mr. Johnson, Mr. Scott, or their families. 162a. To the extent he ever said he was afraid of or threatened by them, it was a lie. 163a-166a.

At the time of his testimony at the evidentiary hearing, Burnette was less than two weeks away from being released on parole. 162a. He made clear that he had nothing to gain by recanting, and that he was doing so simply to address "all the bad and the hurt" that he caused, "so [he] can move forward [with his] life." 162a-163a.

Lameda Thomas testified to the recantation of Raymond Jackson, the only other inculpatory witness besides Burnette. The parties stipulated that Jackson is dead. 191a. Thomas is Jackson's cousin; her grandmother and his mother were sisters. 207a. Jackson spoke to Thomas about his testimony on two occasions. *Id*. He told her that his testimony was a lie he told out of fear of police and the prosecution. 207a-208a, 209a, 210a.

Sanford Schulman represented Mr. Johnson at trial. 193a. He reviewed all discovery materials in preparation for trial. 194a. While those materials revealed there were children in the van when the victim was shot, none of them indicated that any of the children had seen the shooter. *Id*. Therefore, Schulman never attempted to interview any of the children. *Id.*

Schulman made clear, however, that this was a case where he would not "leave any stone unturned," so he would have sought to interview a 7 or 8-year-old child if he had reason to think the child had seen the shooter. 194a-195a. If the witness indicated that Mr. Johnson was not the

shooter, Schulman would have called the witness at trial. 195a ("if a witness proffers some exculpatory testimony, you certainly want to explore that, pursue it . . . [in this case] I certainly would have put that witness on the stand too.").

Schulman testified he views CJ to be a *res gestae* witness, and he would have sought permission to speak with him. 194a-196a, 198a. The reason he did not take such action is because, until recently, he was not aware of any reason to pursue CJ as a witness. 198a.[2]

Domestic Violence Records: Finally, in addition to the witness testimony, the trial court admitted various exhibits, including Exhibit 1, a set of unredacted domestic violence and divorce related documents pertaining to Will Kindred. 12a-39a. The reports outline a series of violent domestic incidents between Will and Lisa Kindred, including one where Will assaulted Lisa and threatened to kill her whole family. 17a-18a. On at least two occasions, police confiscated .22 caliber weapons from Will after such domestic incidents. 16a, 23a.

e. *THE TRIAL COURT DECISION, PEREMPTORY REVERSAL MOTION AND APPEAL*

Following the evidentiary hearing, Judge Callahan issued oral findings and an opinion denying both defendants' motions for relief from judgment. 279a.

Judge Callahan found that the evidence presented at the hearing showed that the death of Lisa Kindred did not stem from a robbery but was instead likely a planned hit set up by Will Kindred. 270a, 271a. Nevertheless, he denied relief upon the possibility that Mr. Johnson and Mr. Scott "may very well have been the co-conspirators involved in this murder plot." 271a.

As to the testimony given by CJ Skinner, Judge Callahan agreed that his description was "completely contrary to the physical characteristics of both defendants in this case," and noted that CJ "clearly says [defendants] were not the individuals that were involved in this shooting." 273a. Nevertheless, he held that CJ's account was insufficient to warrant relief.

[2] The parties stipulated that Mr. Johnson's appellate attorney is dead. 191a.

Because Judge Callahan concluded that the evidence does not support an armed robbery/felony murder theory (the only theory presented to the factfinder), but upheld the convictions anyway, Mr. Johnson and Mr. Scott sought peremptory reversal from the Court of Appeals. The court denied the motion, but **Judge Kurtis Wilder indicated that he would have granted peremptory reversal.** 280a.

On appeal, the Court of Appeals affirmed the decision denying relief from judgment in an opinion dated May 31, 2016. 281a-290a. The court first noted that Skinner's account was new evidence that could not have been discovered before, meaning there are no procedural problems under MCR 6.502(G)(2) or MCR 6.508(D)(3). 283a-284a. It then concluded that the first three *Cress* prongs are satisfied with respect to Skinner's account. 285a. Regarding the fourth *Cress* prong, whether the new evidence creates a reasonable probability of a different outcome upon retrial, the court noted that Judge Callahan based his finding that Skinner's account is insufficient to warrant a new trial on four factors:

> (1) Skinner was only eight years old at the time of the murder and his memory some 16 years later could not be certain; (2) it would have been incredibly difficult for Skinner to be inside a car at night and see someone outside the vehicle when the only illumination was from the vehicle's interior dome light, especially when considering that both Lisa and the car door were between him and the shooter; (3) Skinner had already been convicted for perjury; and (4) in any event, Skinner likely would have been asleep inside the car at the time of the murder. 286a.

The Court of Appeals agreed that the fourth reason given by Judge Callahan constituted clear error, as the prosecution had conceded. 286a. Nevertheless, the Court of Appeals majority indicated that the trial court did not clearly err in reaching the other three conclusions, and thus the ultimate decision could be affirmed. *Id.*

Judge Deborah Servitto wrote separately to state that she believed the third reason given by the trial court was also clear error, but the trial court's decision could be affirmed on the basis of just the first two reasons. 291a-292a.

The Court of Appeals held that the other evidence presented at the evidentiary hearings—the recantations of Burnette and Jackson and the victim's husband's history of domestic violence—were outside the scope of this Court's remand, and the trial court erred in allowing a record to be made on those claims. 289a-290a. Even though this evidence convinced the trial court that the murder could not have been part of an attempted robbery (which was the only theory of guilt presented to the factfinder at trial), the Court of Appeals concluded that the trial court's opinion on this matter was "not pertinent." 290a.

f. *LEAVE TO APPEAL IN THIS COURT*

Mr. Johnson and Mr. Scott sought leave to appeal in this Court, and this Court granted leave in both cases in separate orders dated November 1, 2017. In Mr. Johnson's case, the Court directed the parties to address:

> (1) whether the trial court abused its discretion by declining to grant a new trial on grounds of newly discovered evidence, in light of the testimony of Charmous Skinner, Jr., at the post-conviction evidentiary hearing; (2) whether, even if the defendant's previous claims of new evidence are barred under MCR 6.508(D)(2), the evidence on which those claims were based must still be considered in determining if the new evidence from Charmous Skinner, Jr., makes a different result probable on retrial, *see People v Cress*, 468 Mich 678, 692 (2003); and (3) whether trial counsel rendered constitutionally ineffective assistance by failing to interview Charmous Skinner, Jr., or call him as a witness at trial. 293a.

ARGUMENT

Introduction

This is a truly overwhelming case that provides this Court an ideal opportunity to correct a common misapplication of *Cress*. Here, a murder victim's own son—an undisputed eyewitness in a case that has no other eyewitnesses—was not called at the original trial, has now come forward and exculpated the defendants, yet the lower courts have denied post-conviction relief. The denial stems from a fundamental misunderstanding of how the materiality prong of *Cress*.

This Court intended *Cress* materiality to be a holistic inquiry, weighing all of the evidence in the record. This makes sense: one can hardly decide whether new evidence warrants a new trial without also considering and weighing the original evidence. In this case, however, the lower courts failed to consider the weakness of the inculpatory evidence in deciding whether CJ Skinner's eyewitness account creates a reasonable probability of a different outcome on retrial. Given that key parts of the inculpatory testimony have been proven impossible based on independently verifiable events, it was an abuse of discretion for the lower courts to deny relief.

Even if a jury might have some questions about Skinner's account, it would consider these questions not in a vacuum, but in conjunction with the obvious credibility issues present in the prosecution's own case. And there is a reasonable probability that such balancing of the evidence would favor Mr. Johnson and Mr. Scott.

A full evaluation of the record of this case makes clear that sustaining Mr. Johnson and Mr. Scott's convictions is patently unreasonable. After the evidentiary hearing on remand, the trial judge concluded that the evidence in this case cannot support an attempted robbery theory. **Having concluded that the evidence cannot support the only theory of guilt the prosecution presented at trial, the trial court clearly abused its discretion in denying relief from judgment.** This Court should reverse and remand for a new trial.

Standard of Review

A trial court's ruling on a motion for relief from judgment under MCR 6.500 is reviewed for abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). Findings of fact are reviewed for clear error. *Id.* Questions of law are reviewed *de novo*. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

A trial court abuses its discretion when it "chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008) (citation omitted). Appellate courts "examine the reasons given by the trial court. . . . Where the reasons given by the trial court are inadequate or not legally recognized, the trial court abused its discretion." *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997) (citation omitted).

A trial court clearly errs when its "findings do not accurately portray the factual background of the case." *McSwain*, 259 Mich App at 682-83 (citation omitted). A "finding is clearly erroneous when…the reviewing court, **on the whole record**, is left with a definite and firm conviction that a mistake has been made." *Bynum v ESAB Grp.*, 467 Mich 280, 285; 651 NW2d 383 (2002) (emphasis added).

While trial courts are given deference, the clear error standard has been interpreted to mean (1) reviewing courts give "less deference to the factual findings of trial judges than to the factual findings of juries"; and (2) a trial court can be "clearly erroneous even when there is some evidence to support [its findings]." *McSwain*, 259 Mich App at 682-83 (citation omitted).

I. The Trial Court Abused Its Discretion In Declining To Order A New Trial In Light Of The New Eyewitness Account Of The Victim's Son, CJ Skinner: In The Context Of The Evidence Presented At Trial, This New Evidence Creates A Reasonable Probability Of A Different Outcome Upon Retrial.

A defendant is entitled to a new trial based on newly discovered evidence where: (1) the

evidence itself, not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the evidence makes a different result reasonably probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citations omitted).

The first three prongs of the *Cress* test have not been seriously disputed in this case. Indeed, the Court of Appeals agreed that the first three prongs of the *Cress* test are satisfied, and "the central issue" here is whether the fourth prong is met. 285a. This Court's precedents on *Cress* materiality (the fourth prong) make clear that the inquiry must involve an evaluation of the proposed new evidence in light of all the evidence, new and old, to decide whether the evidence "would make a different result reasonably probable on retrial." *People v Tyner*, 497 Mich 1001; 861 NW2d 622 (2015).

Cress itself is an example of the materiality prong of the new evidence test being evaluated, not by viewing the proposed new evidence in a vacuum, but rather in conjunction with the other evidence from the case. The new evidence at issue in *Cress* was the confession of a third party, Michael Ronning. *Cress*, 468 Mich at 682. In weighing materiality, this Court considered the other facts from the case and ultimately concluded that Ronning's confession was not credible because it "sharply deviated from the established facts regarding the crime." *Id.* at 692-93. In other words, this Court engaged in a substantive review of the all of the evidence presented at trial and then decided whether the new evidence was reasonably likely to change the outcome at a new trial, given the strengths and weaknesses of the original trial evidence.

People v Grissom, 492 Mich 296; 821 NW2d 50 (2012), is another clear example of the holistic materiality review this Court anticipates under *Cress*. The new evidence at issue in *Grissom* was impeachment evidence against the complainant in a rape case: Years after Grissom's conviction, it was discovered that the complainant had fabricated rape allegations in

other instances. *Id.* at 305-11. In determining the materiality of this new evidence, this Court noted the necessity of balancing the new impeachment evidence against the other "evidence presented against defendant that did not involve the complainant's credibility." *Id.* at 311. This Court remanded for a materiality analysis, directing "the trial court [to] carefully consider the newly discovered evidence in light of the evidence presented at trial." *Id.* at 321. *See also id.* at 338-42 (Markman, J., concurring) (repeatedly stressing the need to weigh the evidence from trial as part of a proper *Cress* materiality inquiry).

Despite *Cress* and *Grissom*, the courts below in this case clearly failed to consider the strengths or weaknesses of the original evidence from trial in deciding *Cress* materiality. There is not a single mention in the Court of Appeals opinion about the credibility of Antonio Burnette and Raymond Jackson, the only two inculpatory witnesses, even though **much of their testimony has been proven to be impossible by independently established events** (as detailed below). And the trial court's opinion denying relief also failed to acknowledge or account for the glaring problems in the original inculpatory testimony.

The courts below also engaged in an improper analysis of Skinner's credibility in declining to grant relief from judgment. The proper standard is whether there is a reasonable probability that **a jury *could* believe** Skinner's account over the inculpatory testimony from the original trial. As discussed below, the answer is yes, and thus, this Court should reverse the trial court and remand for a new trial.

A. The Courts Below Failed To Address The Original Evidence From Trial: Crucial Parts Of The Testimony Of The State's Witnesses Have Been Shown To Be Impossible, And All Of The Inculpatory Testimony Has Been Recanted.

Whether a new trial should be granted under the *Cress* standard is a relative inquiry, and this is the basic point that the courts below mishandled in this case. It is impossible to evaluate the weight of a new exculpatory eyewitness without the considering how strong the evidence at

trial was. In a case featuring five credible inculpatory eyewitnesses, a DNA match and a confession, a new exculpatory eyewitness would probably not satisfy the fourth *Cress* prong. But in a case like Mr. Johnson's and Mr. Scott's—which had no physical evidence and no eyewitnesses, just wavering second-hand accounts from two young men who admitted even at trial to being intoxicated and also incentivized or intimidated by police, and who have since recanted—the same type of exculpatory eyewitness changes the calculus entirely. A trial court abuses its discretion when it fails to consider the original evidence in an analysis of *Cress* materiality because without doing so, it simply cannot do what this Court's precedent requires.

So, whether new evidence satisfies the fourth *Cress* prong is a question that requires an analysis of the new evidence in the context of the original case. Not only do this Court's decisions in *Cress* and *Grissom* recognize as much, the U.S. Supreme Court explained the same point succinctly in a comparable context, writing, "**if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt**." *United States v Agurs*, 427 US 97, 112-13; 96 S Ct 2392; 49 L Ed 2d 342 (1976) (emphasis added).

In the case at bar, neither court below evaluated the credibility of the original inculpatory evidence at trial at all. Had that evaluation been made, it would be clear that Mr. Johnson's and Mr. Scott's convictions are "already of questionable validity," and a witness like CJ Skinner creates a reasonable probability of a different outcome upon retrial.

Antonio Burnette and Raymond Jackson provided the only inculpatory evidence at trial. Now both witnesses have recanted, and **much of their testimony has been proven untrue**.

That Burnette lied at trial is proved by independently established facts. Burnette implicated the defendants by: 1) saying they confessed to "hitting a lick" when he met up with them at 2:30-4:30 a.m. the night of the murder, and 2) saying that he saw each defendant hide a

gun in their respective girlfriends' cars. **Both points of his testimony are verifiably untrue.**

When asked what time he saw Mr. Scott place a gun in his girlfriend's car, Burnette said over and over that it was the next morning around 7:00 or 8:00 a.m. 59a, 60a, 107a-108a, 112a-113a, 114a-115a, 117a. **This is not possible because Mr. Scott was already in custody by that time**, as shown by his witness statement, which was given at 6:55 a.m. at the Detroit Police Department. 192a. Indeed, Officer Jon Falk's report, signed at 5:40 a.m., notes that Mr. Scott had already been "conveyed to section" by that time. 43a. Furthermore, police officer Rodney Jackson affirmed that when he arrived at work on the morning in question, which he put at 8:00 or 8:30 a.m., Mr. Scott was still in custody. 97a-98a. (Mr. Scott was in fact never released after his initial arrest.) Therefore, Burnette simply could not have seen Mr. Scott place a gun in his girlfriend's car as he repeatedly said he saw "the next morning." Mr. Scott had already been in custody for hours by then.

Next, when asked at trial what time the conversation occurred in which he claimed Mr. Johnson and Mr. Scott talked about hitting a lick and shooting somebody, Burnette consistently stated that it started around 2:30 or 3:00 a.m., and lasted until perhaps 4:30 a.m. 56a, 58a, 67a, 103a, 116a, 143a, 147a. However, **Mr. Scott was already in custody by that point and could not have participated in that conversation**. Officer Willie Soles transported Mr. Scott and Raymond Jackson to the homicide division for questioning shortly after the murder. 46a-47a. His report does not list a time, but given that this shooting happened between midnight and 1:00 a.m., the implication is that Mr. Scott was arrested shortly after 1:00 a.m. *See also* Scola Report 44a-45a. Raymond Jackson, who was arrested with Mr. Scott, estimated that he was arrested at 1:15 a.m. and in custody for 4-5 hours before making his statement, which lists a time of 5:10 a.m. 145a, 192a.

This evidence shows a strong likelihood that Burnette's original testimony implicating

Mr. Johnson and Mr. Scott was completely false. Burnette also recanted his trial testimony under oath at the evidentiary hearing, and he explained that he implicated Mr. Scott and Mr. Johnson out of fear of the police. 159a-161a, 164a, 169a-170a, 171a-173a.

The only other inculpatory witness, Raymond Jackson, had just been released from the hospital after psychiatric treatment when brought in to testify. 50a-51a. He admitted that he heard and saw things that were not there, and that he had trouble distinguishing the real from the imagined. 122a, 129a-130a, 133a-134a. At trial, Jackson averred that he was afraid that he would be charged with the murder, and he only implicated the defendants after being told that they were implicating him. 74a, 77a, 130a, 132a. Jackson's cousin, Lameda Thomas, confirmed at the evidentiary hearing that Jackson told her he had lied to implicate Mr. Johnson and Mr. Scott because he was afraid of being implicated himself. 207a-208a, 209a, 210a.

The courts below failed to consider any of these facts in deciding whether Skinner's new eyewitness account would create a reasonable probability of a different outcome. That failure was legal error, and therefore an abuse of discretion, given the directives of *Cress* and *Grissom*.

B. The Courts Below Also Improperly Evaluated Skinner's Own Credibility By Failing To Judge The Full Weight And Credibility Of His Account In Proper Context To Answer The Only Relevant Question: Could A Jury Reasonably Credit The New Exculpatory Evidence Over The State's Original Inculpatory Evidence?

Certainly a post-conviction court has some baseline role in determining whether the new evidence is sufficient to warrant presentation to a new jury at a new trial. But post-conviction courts must be careful not to overstep their authority in this context. Because our judicial system values factfinding by a properly informed factfinder, issues of credibility must largely left to the jury to decide upon retrial. *See Ramonez v Berghuis*, 490 F3d 482, 490 (CA 6 2007) ("After all, what the state court has really done is to state its view that there is not a reasonable probability that the jury would believe the testimony and thus change its verdict. And in that regard . . . our

Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence.").

CJ Skinner's account is not perfect: no eyewitness account ever is. But it is easily sufficient to warrant presentation to a new jury at a new trial, and the courts below abused their discretion in holding otherwise. *See e.g. People v Ortiz*, 919 NE2d 941 (Ill 2009) (relief granted in a factually similar case).[3]

Prosecutors routinely obtain convictions based on eyewitness testimony. Our courts do not require that an eyewitness have a perfect view of the perpetrator to uphold a conviction. Instead, so long as the identification was not the product of unconstitutional police suggestion, the court must allow the jury to decide whether the eyewitness's account is reliable given all of the surrounding circumstances. *See e.g. People v Kurylczyk*, 443 Mich 289, 316; 505 NW2d 528 (1993) (upholding conviction based on eyewitness identification, noting that jury had convicted even though defense counsel had vigorously pointed out "defects in the eyewitness identifications").

Likewise, when deciding *Cress* materiality, the proper question is not whether the judge at the post-conviction hearing finds the new eyewitness to be flawless and compelling: Instead, it is whether a jury *reasonably could* credit the new witness over the prosecution's original inculpatory theory. *See People v Clark*, 363 Mich 643, 647; 110 NW2d 638 (1961) (relief is

[3] In *Ortiz*, the Illinois Supreme Court wrote:

> "The newly discovered evidence directly contradicts the recanted testimony of the two prosecution witnesses . . . . During cross-examination at the evidentiary hearing, the State was unable to discredit [the new witness's] testimony that he witnessed both the beating and the shooting, and that defendant was not present during either event. No physical evidence linked defendant to the murder. Thus, at retrial, the evidence of defendant's innocence would be stronger when weighed against the recanted statements of the State's eyewitnesses. The fact finder will be charged with determining the credibility of the witnesses in light of the newly discovered evidence and with balancing the conflicting eyewitness accounts." *Ortiz*, 919 NE2d at 951–52.

warranted where the new evidence (in context) "**might effect** a different result on a retrial of the cause") (emphasis added). In this case, there can be no question that Skinner's account meets the proper standard, and this case therefore warrants a new trial.

The courts below agreed that Skinner's account was the central piece of new evidence, but failed to evaluate the full weight and credibility of that new evidence. The trial court answered the wrong question, essentially holding that a new trial is not warranted because Judge Callahan himself did not find Skinner's account perfectly credible. The Court of Appeals answered the wrong question as well, limiting its review to whether the four reasons Judge Callahan gave for not believing Skinner were reasonable.

The real question is not what Judge Callahan *would do*, but rather what a new jury *reasonably could do* if given all of evidence on retrial. *See e.g. Barker v Yukins*, 199 F3d 867, 874-75 (CA 6 1999) ("It is neither the proper role for a state supreme court, nor for this Court, to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others. Rather, it is for the jury . . . to decide [who to believe]."). In answering the wrong legal question, the lower courts abused their discretion. *See Grissom*, 492 Mich at 321 (abuse of discretion "necessarily" established where court applied wrong legal standard).

1. The four factors the Court of Appeals mentioned all support the defendants' position: A proper analysis of all four supports a finding of "reasonable probability of a different outcome."

Because all of the four factors the trial court relied upon, and the Court of Appeals recounted, favor Mr. Johnson and Mr. Scott, the courts below erred in denying a new trial.

i. The trial court clearly erred in finding that Skinner was most likely asleep when the shooting occurred.

There is no disagreement that the trial court erred on this point. The prosecution has

agreed that there is nothing in the record to support this finding, and the Court of Appeals took as a given that this finding was clear error. 286a.

ii. The trial court clearly erred in finding that Skinner's memory of the events would be per se *insufficient, given that 16 years had passed since the night of the shooting.*

Although Skinner's account of the night of the shooting is detailed and corroborated by other evidence from the case, Judge Callahan seized on trivial points to conclude that Skinner's memory is insufficient. To the extent there were any small inconsistencies, this actually supports Skinner's credibility. *See People v Grant*, 470 Mich 477, 491 n.10; 684 NW2d 686 (2004) ("Some internal inconsistencies are expected when children recall an incident long past.").

Moreover, Judge Callahan's findings ignored the actual record, relying instead on speculation. For example, he found it problematic that Skinner could not answer his questions about unrelated details such as the name of his school or his third-grade teacher. 276a. As a result, the judge rejected Skinner's description of the night of his mother's murder, saying, "I bet he couldn't remember what his mother looked like today." *Id.*

However, Judge Callahan ignored Dr. Rosenblum's uncontested testimony indicating that traumatic events can lead to a "narrowing of attention" such that people "focus on and remember very clearly particular details . . . . to the exclusion of some other more peripheral details." 260a. These memories made in a moment of high traumatic stress are less susceptible to exaggeration over time. *Id.* The judge compounded his error by stating that Skinner's account lacks credibility because he (the judge) could not recall the faces of his own father and wife, who both passed away some years ago. 276a. But as Dr. Rosenblum said, memories formed under moments of stress are quite resilient. Any lay juror could reasonably accept that traumatic experiences are "burned into" memory, while other events are easily forgotten.

Judge Callahan did not account for any of Dr. Rosenblum's testimony in his findings,

although he had admitted her "as an expert in the field of clinical and developmental psychology with a particular focus on children." 258a. The Court of Appeals stated that the trial court is not obligated to accept Dr. Rosenblum's opinion. 286a. That statement misses the point, which is that Judge Callahan did not reject Dr. Rosenblum's opinion; he ignored it. Certainly the trial court is not obligated to accept the account of any witness, but if the court deems a certain witness's uncontroverted account insufficient, there have to be reasons. *See e.g. Leonard*, 224 Mich App at 580 (abuse of discretion occurs "[w]here the reasons given by the trial court are inadequate."); *People v Thenghkam*, 240 Mich App 29, 42; 610 NW2d 571 (2000) ("[a] factual finding without support in the record constitutes clear error.") (*abrogated on other grounds by People v Petty*, 469 Mich 108; 665 NW2d 443 (2003)).

The trial court did not provide a single reason why Dr. Rosenblum's unrebutted testimony was insufficient. Instead, Judge Callahan simply followed his gut feeling over the opinion of an eminently qualified child psychologist. Judge Callahan is entitled to his personal opinion, but his task was to evaluate *whether a jury upon retrial reasonably could* accept Dr. Rosenblum's position and thus deem Skinner's memory to be credible enough. The answer to that proper question is an obvious "yes."

iii. The trial court clearly erred in finding that there was insufficient light for Skinner to view the shooter or that his view of the shooter would have been obstructed.

Judge Callahan found that Skinner could not have seen the shooter outside the van because the interior dome light of a car, in his opinion, does not illuminate anything outside the car, and the Court of Appeals deemed this finding to be reasonable. However, the courts below clearly erred because this finding neither acknowledged nor accounted for the many cases cited by the defense that establish that a car's interior dome light *can* illuminate things outside of the

car.[4]

In this case, it was especially likely that the dome light would have illuminated the shooter's face because, as Skinner noted, the shooter was "damn near" his mother as she got into the car. 233a. The Court of Appeals asserted that "Skinner did not testify that the shooter leaned inside the car or was ever located near the door opening while the door was open," 286a, but that assertion is simply contrary to Skinner's testimony.

Mr. Johnson and Mr. Scott certainly made a sufficient showing that a jury *could deem reasonable* Skinner's account of seeing the shooter. Judge Callahan clearly erred in ignoring the only evidence in the record on this point to summarily conclude that there was not enough light to see the shooter. "[A] factual finding without support in the record constitutes clear error." *Thenghkam*, 240 Mich App at 42.

Judge Callahan also found that Skinner could not have seen the shooter because his mother would have obstructed his view, and the Court of Appeals also deemed this finding to be reasonable. However, the record proves otherwise: Judge Callahan did not even acknowledge Skinner's repeated assertion that the shooter was not directly behind his mother, but rather was off to the side. 219a, 232a, 233a. **Skinner drew a depiction of the encounter which shows the shooter off to the side, and not directly behind his mother**. *See* 252a. There was simply no

[4] *See e.g. People v Tyner*, No. 309729, 2014 WL 2566246 (Mich App June 5, 2014) (upholding conviction based on witness identification of defendant who was standing outside of a car, illuminated by the car's dome light) (*reversed on other grounds*, 861 NW2d 622 (Mich 2015)); *Seals v Rivard*, No. 07-11309, 2014 WL 1091749, (ED Mich Mar 18, 2014) (denying habeas relief in case where witness identified gunman outside his own car illuminated only by the car's dome light); *Caldwell v Lafler*, No. 4:04-CV-133, 2008 WL 907536 (WD Mich Mar 31, 2008) (denying habeas relief where witness had "testified that because his car door was open during the robbery, the dome light provided enough light for him to identify Petitioner as his assailant.") (all unpublished, attached as 295a-333a). (The citation to the unpublished *Tyner* opinion satisfies MCR 7.215(C)(1) because the case is cited simply as an example of a factual situation where courts and juries have deemed reasonable the same fact pattern that the trial court erroneously deemed to be *per se* unreasonable, and because Mr. Johnson has not found Michigan published authority involving the same facts).

basis in the record for the trial court to find that Skinner's view would have been obstructed by his mother, and thus that finding was clear error. Again, "[a] factual finding without support in the record constitutes clear error." *Thenghkam*, 240 Mich App at 42.

iv. The trial court abused its discretion in finding that Skinner could be lying to protect his mother's killer.

In perhaps the most unreasonable of his findings—anchored in nothing in the record, and actually contrary to much of it—Judge Callahan speculated that Skinner's testimony may have been induced or may have simply been an outright lie, given that he has a prior conviction for lying. 272a-273a. Two judges on the Court of Appeals panel deemed this finding to be reasonable, though Judge Servitto wrote separately to note it is unreasonable to conclude that Skinner would lie to protect his mother's killer. 287a, 292a.

Judge Callahan speculated that Skinner's account may have been induced: "Who's to say what influences may have been plied against Mr. Skinner?" 272a. Because those words make clear that the judge relied on speculation instead of facts in the record, his findings on this point were clear error. *Thenghkam*, 240 Mich App at 42 ("[A] factual finding without support in the record constitutes clear error.").

Skinner made clear that he is not friendly with the defense, and indeed refused to meet with defense counsel when they traveled to Pennsylvania in the days leading up to the hearing. 250a-251a. Further, Skinner made clear that he does not know Mr. Johnson or Mr. Scott, had no prior contact with them, and has no incentive to help either of them. 230a-231a. And it is hard to see how Mr. Johnson or Mr. Scott could have "plied influences" given that they are incarcerated in Michigan, and Skinner has resided in eastern Pennsylvania since 1999.

Further, Judge Callahan suggested that Skinner's account *per se* lacks credibility because he has lied in the past. 273a ("Should we believe him, seeing as how he was in prison for

perjury? I mean good grief. Doesn't that go right to the essence of it?"). But in our justice system, prior missteps are not a permanent bar against credibility. A jury reasonably could believe that Skinner is telling the truth *in this case*. Jury instructions instruct jurors to weigh prior convictions "along with all the other evidence" in judging credibility. Mich. Crim. JI 5.1.

In this case, **Skinner's testimony is about his mother's death, and to lie would be to take the risk that the true killer walks free,** while the prior lie that Skinner told was to protect his best friend. 228a. For Judge Callahan to refuse to evaluate the circumstances, as a jury would do at retrial, and instead categorically deem Skinner a liar because he once lied in the past, was legal error constituting abuse of discretion. *Grissom*, 492 Mich at 321.

2. Several other factors corroborate Skinner's account, and the lower courts erred in failing to consider them.

Whether or not Skinner's account is credible is an analysis that turns on more than just the four factors the courts below mentioned. There are many additional reasons why a jury on retrial reasonably could find Skinner's account credible.

First, Skinner's testimony was corroborated by other witnesses and evidence in the trial record, something the courts below failed to even acknowledge. Skinner recalled that the movie the family had seen was "Life." 241a-242a. This is consistent with the police statement of Verlin Miller, which notes that Will told him that they had seen "Life." 48a-49a. Skinner recalled that his mother was driving, which is consistent with Will's testimony from trial. 215a, 88a. Skinner's recollection of the subsequent events (his mother growing agitated, going to the door to speak with Will, and then returning to the car just before the shooter emerged) is also corroborated by the testimony of Will Kindred and Miller. *E.g.* 54a-55a; 84a-85a, 93a, 95a-96a. Finally, his recollection that only one shot was fired, and that the glass shattered when the shot was fired, is consistent with the testimony of the medical examiner, who concluded that Lisa was

shot one time, and likely through an intermediate object like glass. 52a-53a.

Second, Skinner's behavior and attitude—from the first letter that Scott Lewis sent him in 2011 through the day he testified in court in 2015—make it more likely that a reasonable jury would find him credible. In his first letter to Lewis, Skinner made clear that he wanted to tell the truth, regardless of whether it inculpated or exculpated the men currently in prison: The letter concluded with: "I will never forget the person's face, and **if it is him, I will testify against him**. But if it's not, I would not mind testifying on his behalf." 226a (emphasis added). At the hearing, Skinner again made clear that his primary motive was to find his mother's true killer. 231a.

A jury on retrial would find that Skinner has acted with proper motives and has attempted to tell the full truth about the most traumatic experience of his life. The jury would see that Skinner is not biased toward either of the defendants or defense counsel. And Skinner made absolutely clear that neither Mr. Johnson nor Mr. Scott could have been the perpetrator. Such powerful eyewitness testimony from the victim's own son, the only eyewitness ever presented in this case, creates a reasonable probability of a different outcome upon retrial.

3. Judge Callahan's findings pertaining to Skinner deserve less deference than factual findings in other cases because: a) he did not preside over the original trial and, b) his findings were not based on intangibles that only the trial court can properly evaluate, but rather were based on factors that the appellate courts can evaluate equally.

The Court of Appeals stressed deference to trial court findings as an important principle, almost as if to say that the concept of deference ends the inquiry. 287a. The court cited to *Tyner*, 497 Mich 1001, to hold that trial court factual findings should not be disturbed. However, just because the Court of Appeals erroneously reversed a trial court's grant of a new trial in *Tyner* does not mean that every single trial court decision should be affirmed. Indeed, the U.S. Supreme Court has made clear that "deference does not imply abandonment or abdication of judicial review." *Miller-El v Cockrell*, 537 US 322, 340; 123 S Ct 1029; 154 L Ed 2d 931 (2003).

Importantly, *McSwain* instructs that trial judges get less deference than juries. *McSwain*, 259 Mich App at 682-83. And, to the extent that appellate courts defer to findings of trial judges, such deference is based on an underlying principle, expressed in a concurrence from this Court that was cited in both *Tyner* and the decision below. In *Alder v Flint City Coach Lines*, Justice Leland Carr stated that trial judges get deference because they are able to note the attitude of the jury as to various matters that come up at trial. 364 Mich 29, 38; 110 NW2d 606 (1961) (Carr, J., concurring). **But that reason for the rule does not apply in this case.** Judge Callahan did not preside over the trial in either Mr. Johnson's or Mr. Scott's cases: to make his decisions about what may have been important at trial and how the new evidence would affect the case at retrial, he must rely on the trial transcripts, just like an appellate court would.[5]

Finally, deference is only appropriate when the trial court makes findings on issues that actually warrant deference. Had Judge Callahan commented on Skinner's demeanor or body language, for example, those findings might warrant deference. But he made no such findings. Instead, the three issues that Judge Callahan evaluated that the Court of Appeals upheld as reasonable bases for his decision were:

1. How good would someone's memory be about an event he witnessed 16 years earlier?
2. How reasonable is the idea that a car's dome light can illuminate someone standing outside the car, especially given the cases cited in footnote 5 above?
3. How likely is it that a person with a perjury conviction will lie again?

These issues have something in common: they all turn on analysis of case law, psychological research or internal beliefs. **They have nothing to do with those factors that are inherently the province of the trial court (body language, demeanor, etc.).** This Court is just as capable of evaluating the merits of such questions as Judge Callahan was.

[5] *See also Grissom*, 492 Mich at 322-23, 324 n.2 (Kelly, J., concurring) (noting that since original trial judge had retired, this Court was just as qualified to make credibility determinations as the new trial judge would be).

Deference is an important principle, but here the Court of Appeals merely used it as an excuse to avoid confronting the record. By any standard, the trial court's findings pertaining to Skinner were clear error, and it abused its discretion in denying relief from judgment.

Overall, the account of Skinner, considered in the context of the evidence presented at the original trial, creates a reasonable probability of a different outcome. Therefore, the fourth prong of *Cress* is satisfied (even without considering the other helpful evidence discussed in Argument II), and this Court should reverse and remand for a new trial.

II. Other Exculpatory Evidence In The Record, Which Mr. Johnson Presented In Prior Motions, Is Relevant To The Materiality Analysis Of The New Evidence (Skinner's Account), Even Though MCR 6.508(D)(2) Bars Relief Being Granted On That Other Evidence Itself.

Skinner's eyewitness account is sufficient to establish materiality under *Cress*, given the weaknesses in the original evidence at trial. Thus this Court can grant relief under Question 1 of its order granting leave to appeal without ever reaching Question 2. But if the Court reaches Question 2, it should hold that other exculpatory evidence in the record—aside from the original trial testimony and the new account of Skinner—should be considered in the *Cress* materiality analysis.

The pertinent question when evaluating the fourth *Cress* prong is whether there would be a reasonable probability of a different outcome upon retrial. *See e.g. Tyner*, 497 Mich 1001. This means that the analysis should include everything the new jury would be able to consider. Thus, in evaluating whether Skinner's account creates a reasonable probability of a different outcome, the Court should consider all of the exculpatory evidence that would be presented at a hypothetical retrial.

A. Persuasive Authority From Sister Jurisdictions

The language this Court used in *Cress* and *Grissom* seems to support this view, but those

cases did not explicitly consider evidence that was presented neither at trial nor in the instant post-conviction motion, but rather in a previous post-conviction motion. And although this precise question has not been addressed by the majority of sister jurisdictions, the authority that is available reinforces Mr. Johnson's position. The **Florida** Supreme Court, has stated the proposition clearly on multiple occasions, most recently noting:

> [T]he postconviction court must consider the effect of the newly discovered evidence, in addition to **all of the admissible evidence that could be introduced at a new trial**. In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a total picture of the case and all the circumstances of the case.

Hildwin v State, 141 So 3d 1178, 1184 (Fla 2014) (citations omitted) (emphasis added). *See also Swafford v State*, 125 So 3d 760, 776 (Fla 2013) ("In determining the impact of the newly discovered evidence, the Court must conduct a cumulative analysis of all the evidence so that there is a total picture of the case and all the circumstances of the case.") (internal quotations omitted); *Lightbourne v State*, 742 So 2d 238, 247 (Fla 1999) (New evidence should be evaluated "in light of the other evidence adduced *since trial*, to determine whether it would probably produce a different result.") (emphasis added).

The **California** Supreme Court has also come to the same conclusion in multiple cases. In *In re Branch*, 449 P2d 174 (Cal 1969), that court noted that "evidence undermining the prosecution's case so as to warrant habeas corpus[6] relief must be 'new' evidence." *Id.* at 183. But it went on to say: "However, it is so fundamentally unfair for an innocent person to be incarcerated that he should not be denied relief simply because of his failure at trial to present exculpatory evidence. Thus, **the term 'new evidence' . . . should be held to include any evidence not present to the trial court and which is not merely cumulative** in relation to

[6] "Habeas corpus" is the term California and many other jurisdictions use when referring to their equivalent of motions under MCR 6.500 *et seq*.

evidence which [w]as presented at trial. *Id.* at 183–84 (emphasis added). The Court reiterated the same point in *In re Hall*; 637 P2d 690, 696 (Cal 1981): "[A] habeas corpus petitioner must first present newly discovered evidence that raises doubt about his guilt; once this is done, he may introduce any evidence not presented to the trial court and which is not merely cumulative. . . ." *See also In re Miles*, 213 Cal Rptr 3d 770, 793-94 (Cal App 2017) (weighing cumulatively the materiality of evidence presented during two separate post-conviction proceedings).

Other relevant authority comes from:

- **Arizona:** *State v Hess*, 290 P3d 473, 476 (Ariz 2012) (post-conviction court may evaluate "other evidence" that was not presented at trial in determining "whether the newly discovered evidence probably would result in a different verdict.").

- **Illinois:** *People v Wilson*, 2017 IL App (3d) 140606-U ¶¶ 7, 8, 18 (Ill App Ct September 7, 2017) (applying Illinois Supreme Court's language directing materiality to be gauged "considering all the evidence, both new and old, together," to consider evidence presented in a prior post-conviction motion as part of materiality analysis of new evidence presented in a later motion) (quoting *People v Coleman*, 996 NE 2d 617, 638 (Ill 2013)).

- **Maine:** *State v Dodge*, 127 A 899, 903 (ME 1925) (noting that materiality analysis of new evidence in a post-conviction motion is made "upon a review of the whole evidence new and old in the light of the surrounding circumstances.").

- **Massachusetts:** *Commonwealth v Rosario*, 74 NE3d 599, 607 (Mass 2017) ("[A] trial judge may need to look beyond the specific, individual reasons for granting a new trial to consider how a number of factors act in concert to cause a substantial risk of a miscarriage of justice and therefore warrant the granting of a new trial.").

- **Nevada:** *Berry v State*, 363 P3d 1148, 1155 (Nev 2015) (noting that "[t]he district court must make its determination concerning the petitioner's innocence in light of all the evidence . . . old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.") (internal quotation omitted).

The manner in which federal courts weigh the materiality of new evidence in determining actual innocence is also persuasive. The U.S. Supreme Court has repeatedly noted that the materiality analysis "must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that

would govern at trial." *House v Bell*, 547 US 518, 538; 126 S Ct 2064; 165 L Ed 2d 1 (2006) (quoting *Schlup v Delo*, 513 US 298, 327-28; 115 S Ct 851; 130 L Ed 2d 808 (1995)).

B. Application Of Holistic Materiality Analysis To Mr. Johnson's Case

In the case at bar, the relevant evidence that Mr. Johnson presented after trial, but before the instant motion for relief from judgment, consists of two things: the recantations of both prosecution witnesses and the domestic violence records, which for the first time show the victim's husband to have been a violent man whose prior behavior and possible motives should have made him a primary suspect in this case.

Because Mr. Johnson presented the recantations and the domestic violence records in a prior motion for relief from judgment, those are not new evidence *claims* for him. (Mr. Scott, however, never filed a prior motion, so the recantations and domestic violence records do constitute separate *Cress* claims for him.) Nevertheless, as discussed above, it makes sense for a court evaluating the materiality of CJ Skinner's new eyewitness account to consider the domestic violence records and recantations for Mr. Johnson as well.

As long as the evidence was within the scope of the remand and would be available upon retrial, it should have been considered as part of the *Cress* inquiry. The domestic violence records and the recantations were within the scope of the remand, as this Court implicitly acknowledged in its orders granting leave to appeal.[7] And that those pieces of evidence would be available and admissible upon retrial is clear. Burnette would be available to testify to his recantation under oath, as he did at the evidentiary hearing. Jackson is dead but if

[7] In its orders granting leave to appeal, this Court used subtly different language in Question 1 of Mr. Johnson's order and Question 1 of Mr. Scott's order. Question 1 in Mr. Johnson's order specifies that the new evidence claim specifically pertains to the account of CJ Skinner. 293a. However, Question 1 in Mr. Scott's order simply speaks of the new evidence claim generally, presumably meaning to include the recantations and domestic violence records (which Mr. Scott had not previously litigated). 294a.

his original inculpatory testimony were introduced on retrial, his recantation to his cousin would be admissible under MRE 804(B)(3) and MRE 806. Indeed, Mr. Johnson and Mr. Scott have a constitutional right under the Confrontation Clause to have Jackson's recantation presented to a jury upon retrial. *Blackston v Rapelje*, 780 F3d 340, 353-54 (CA 6 2015).

Will Kindred's history of domestic violence would be admissible at retrial as well. First, when a spouse is murdered, the surviving spouse's prior history domestic discord or violence is admissible because it goes to motive and/or state of mind. *People v Fisher*, 449 Mich 441, 448-450; 537 NW2d 577 (1995); *see also People v Ortiz*, 249 Mich App 297, 308-310; 627 NW2d 417 (2001). Next, the prior domestic violence is material impeachment evidence and would be admissible because it relates to the motives, biases and credibility of Will Kindred, a testifying fact witness at trial. *Davis v Alaska*, 415 US 308, 316-17; 94 S Ct 1105; 39 L Ed 2d 347 (1974) (party has right to "cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. . . .").

Finally, a defendant always has a due process right to introduce relevant evidence of third party guilt. *See Holmes v South Carolina,* 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006). In this case, Will Kindred's history of domestic violence toward Lisa and his access to several .22 caliber firearms casts some doubt on his credibility and is highly probative, suggesting that the police should have considered him as a prime suspect. Indeed, **Judge Callahan himself found the domestic violence records persuasive for these same reasons.** 269a-270a.

And this additional evidence brings with it additional materiality, and even more strongly demonstrates that Mr. Johnson and Mr. Scott would have a reasonable probability of a different outcome upon retrial. First, the recantations take away evidence implicating Mr. Johnson and Mr. Scott, while the domestic violence records cast suspicion on Will Kindred as someone who

may have set up his wife's murder. Given those pieces of evidence, a jury is more likely to side with CJ Skinner's exculpatory account over the prosecution's theory of the case.

Second, the likely impact of the domestic violence records on a jury is clear given the effect it had on Judge Callahan, who found that the evidence no longer supports an attempted robbery/felony murder theory. 271a. ("So, could the killing of Lisa Kindred have been a robbery gone bad or a kidnapping gone bad? Not in my opinion."). This is important because that was the only theory the prosecution presented to the factfinder at trial,[8] so if it is no longer viable, then Mr. Johnson and Mr. Scott have shown a reasonable probability of a different outcome.

Judge Callahan's conclusion that the robbery theory is defeated by the new evidence is reasonable: It is supported by the new evidence presented at the evidentiary hearing on remand, including the testimony of Skinner and the domestic violence records. However, Judge Callahan's subsequent failure to grant relief from judgment was an abuse of discretion.

Besides robbery, no enumerated felony in MCL 750.316(1)(b) is applicable to this case, and the prosecution never relied on any other theory (and it affirmatively argued against a finding of premeditated murder, 80a-81a). Thus, the trial court's conclusion that there is no reasonable probability of a different outcome upon retrial, despite its finding that the robbery theory is not viable, is a legally incorrect ruling, because a conviction for felony murder is impossible if the underlying felony cannot be proved. *People v Saxton*, 118 Mich App 681, 689-92; 325 NW2d 795 (1982). Such a legally incorrect ruling is *per se* abuse of discretion. *Grissom*,

[8] The prosecutor repeatedly argued at trial that the death of Ms. Kindred was the result of a robbery gone bad. 135a-136a. Indeed, the prosecutor affirmatively eschewed any theory involving a plan to kill the victim, noting instead: "they were trying to steal, trying to rob someone, trying to steal something. And in the course of that, I believe it was Mr. Johnson who indicated to Jackson, 'I fucked up and had to shoot.'. . . **As a result of that error on his part, we are here** and he is charged with first-degree felony murder, assault with intent to rob while armed, and felony firearm." 80a-81a (emphasis added). At no point during trial did the prosecutor ever argue that the defendants were guilty of premeditated murder. Indeed, she affirmatively argued that there was no premeditation. 80a-81a.

492 Mich at 321 (2012).

The trial court's conclusion that relief should be denied because this *might* have been a premeditated killing in which Mr. Johnson and Mr. Scott conspired with the victim's husband was also an abuse of discretion. This alternate theory of premeditated murder was never presented to the jury and **was affirmatively dismissed by the prosecution at trial**. *E.g.* 80a-81a. Furthermore, there was never any evidence at any point to support a finding that the victim's husband might have conspired with either Mr. Johnson or Mr. Scott, and the sole eyewitness clearly states that neither Mr. Johnson nor Mr. Scott were at the scene of the crime.

And in any case, if Mr. Johnson and Mr. Scott are to be deemed guilty of premeditated murder as opposed to felony murder, **the elements of premeditated murder must be proved beyond a reasonable doubt to a jury upon retrial**. *See e.g. In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Where, as in this case, new evidence presented indicates that guilt for the charged offense could no longer be sustained beyond a reasonable doubt, failure to grant a new trial is a violation of the Due Process Clause. *See United States v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2d 444 (1995) (noting importance of "[t]he right to have a jury make the ultimate determination of guilt").

The point is simple: Mr. Johnson and Mr. Scott were neither charged with nor convicted of premeditated first-degree murder, and no evidence was ever presented that they were part of a conspiracy to murder the victim. The prosecutor affirmatively argued the opposite at trial, stating that the murder was an unforeseen consequence of an attempted robbery.

Thus, it was an abuse of discretion, and a violation of Mr. Johnson's and Mr. Scott's Due Process rights, for Judge Callahan to summarily convict them of this alternate offense, never

presented to a jury, in order to deny relief from judgment and a new trial. Given Judge Callahan's own findings of fact on this issue, the only reasonable outcome is a new trial—where the prosecution can attempt to convict Mr. Johnson and Mr. Scott of premeditated murder, should it so choose, by proving the elements of that offense to a jury beyond a reasonable doubt, as our Constitution requires.

III. If Relief Is Not Warranted Under *Cress*, Then Relief Is Warranted Under *Strickland*, As Trial And Appellate Counsel's Failed To Even Attempt To Locate And Interview A Known Eyewitness.

The Court of Appeals concluded that Skinner's account was not previously discoverable with reasonable diligence, 283a-285a, and for that reason, Mr. Johnson and Mr. Scott argue that relief is primarily warranted under *Cress*. However, in the alternative, Mr. Johnson and Mr. Scott argue that, because their trial and appellate counsel did have reason to know that Skinner was a *potentially* helpful witness, if this Court does not grant relief under *Cress*, it should do so under *Strickland*.

The Sixth and Fourteenth Amendments guarantee a defendant the effective assistance of both trial counsel and appellate counsel on direct appeal of right. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Evitts v Lucey*, 469 US 387, 395-97; 105 S Ct 830; 83 L Ed 2d 821 (1985). Ineffective assistance of appellate counsel is judged on the same standard as that of trial counsel. *People v Reed*, 449 Mich 375, 382; 535 NW2d 496 (1995).

To establish ineffectiveness, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *Strickland*, 466 US at 669. Failure to investigate and present exculpatory evidence renders representation ineffective. *See Wiggins v Smith*, 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

A. Counsel's Performance Is Deficient Where He Fails To Investigate A Known Witness Who Has The Potential To Be Helpful.

This Court has found trial counsel's conduct to be deficient where he failed to call eyewitnesses to a murder, a decision that the Court found could not be justified as trial strategy. *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996). Moreover, this Court has noted that defense counsel perform deficiently where they "failed to consult with key witnesses who would have revealed weaknesses of the prosecution's case," despite being on notice that such witnesses exist. *People v Trakhtenberg*, 493 Mich 38, 53; 826 NW2d 136 (2012).

In *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6 1987), the Sixth Circuit deemed counsel ineffective where "he for no apparent reason failed to investigate a known and potentially important alibi witness." The idea of ineffectiveness being tied to failure to investigate *potentially* helpful witnesses came up also in *Workman v Tate*, 957 F2d 1339, 1345 (CA 6 1992), where the court deemed counsel ineffective where he failed to interview "the only witnesses, aside from [the defendant] and the police officers, who saw what happened [because] [a] reasonable defense attorney would have recognized that, at least potentially, [the witnesses in question] were two very critical witnesses for [the] defense." Finally, the Eighth Circuit's holding in *Chambers v Armontrout*, 907 F2d 825 (CA 8 1990), is illuminating as well: the court found counsel ineffective for failing to interview "the only person to see the entire altercation," whose helpful account was thus "uncontradicted." *Id.* at 831.

B. In This Case, Counsel Were Constitutionally Ineffective Because They Failed To Even Interview CJ Skinner, Though They Had Reason To Know He Had *Potentially* Useful Information.

Counsel would have learned that a child of at least seven years old was present in the car when the shooting occurred from his review of the police reports in the case or just from listening to the testimony at trial. 42a (police report noting a child named CJ was present in the

car, though erroneously listing his age as 7), 82a (Will Kindred testifying that an eight-year-old child was in the car, whom he erroneously calls "DJ"). It is true of course that counsel could not, in advance of interviewing him, be certain that this child would have helpful testimony. But that is precisely why *Strickland* requires attorneys to conduct a reasonable investigation. In failing to conduct that investigation to discover Skinner's account, counsel was constitutionally ineffective.

The courts below abused their discretion in denying the ineffective assistance claim, pled in the alternative to the *Cress* claim. Because the materiality of Skinner's account is clear (as fully explained in the *Cress* discussion above), the question of whether relief is warranted comes down to diligence by trial counsel. The only two possibilities are:

1) Skinner's eyewitness account *could not* have been obtained through reasonable diligence at trial, and relief is warranted under the *Cress* standard discussed above; or

2) Skinner's account *could* have been discovered through reasonable diligence at trial, and relief is warranted under the *Strickland* standard.

See Trakhtenberg, 493 Mich at 55 n. 10 ("Additionally, to the extent that defendant cannot show that he was entitled to a new trial in light of newly discovered evidence under [*Cress*] because he or defense counsel could, using reasonable diligence, have discovered and produced the evidence at trial, defense counsel was further ineffective for not having employed such reasonable diligence.") (internal citation and quotation marks omitted).

The Court of Appeals based its decision on its conclusion that Skinner had moved out of state and was refusing to talk to "anyone" about what he saw. 288a. There are two flaws in the Court of Appeals holding. First, the court misrepresented what Skinner actually said. Skinner had not "refused to talk to anyone," 288a, but rather he indicated that his family did not ask him about what he may have seen, 222a, something Dr. Rosenblum deemed common and unremarkable, 260a-261a. Indeed, Skinner testified that he has always been interested in

catching his mother's killer, and he would have cooperated with the investigation if approached. 222a-223a, 226a, 231a.

The second flaw in the Court of Appeals decision is that it answers the wrong question. The Court of Appeals should have addressed whether a reasonable attorney should have *sought to interview* a witness that the police reports told him had been in the car during the shooting. At the time they would have been making that decision, the attorneys would not have known that Skinner had moved away or might not want to talk about the events, and the Court of Appeals erred in letting hindsight bias affect its inquiry into what a reasonable attorney at the time of trial should have done. The attorneys had a duty to conduct a reasonable investigation, *Strickland*, 466 US at 691, which involves exploring "all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). By their own admission, Mr. Scott's and Mr. Johnson's attorneys did not do that, and thus they performed deficiently.

The trial court was even further adrift in its own ruling on the ineffective assistance claim. First, Judge Callahan indicated that counsel were provided with "records" indicating that Skinner "didn't want to talk to anybody or he was too emotionally upset at that time to have spoken to anyone." 277a. **But no such records actually exist**, and the prosecution has never argued that they do. Skinner made clear that he was never asked about what he saw by police or any attorneys. 222a-223a. There is no way for any attorney to have learned that Skinner "didn't want to talk to anybody or he was too emotionally upset."

Second, Judge Callahan noted that trial counsel "would have had to have jumped through a tremendous amount of hoops" "to get the expense to go all the way out to Philadelphia even to speak to this young man." 278a. In making that finding, Judge Callahan noted that both Mr. Johnson and Mr. Scott had appointed counsel, as if to suggest appointed attorneys have some lesser duty to investigate on behalf of their clients. Even aside from the fact that counsel could

have sought to speak with Skinner on the phone, the trial court's reasoning is contrary to established precedent about an attorney's duty to investigate. All attorneys, appointed or retained, have a constitutional "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 691.

If relief is not granted under the *Cress* claim, then trial and appellate counsel's failure to even seek to interview Skinner would be deficient performance. *See Trakhtenberg*, 493 Mich 38 at n.10. And the prejudice prong of *Strickland* is also satisfied—for the same reasons discussed in the *Cress* materiality discussion above, given that the two standards are nearly identical. *See e.g.*, *Strickland*, 466 US at 694 and *Tyner*, 497 Mich at 1001.

Therefore, the courts below erred in denying relief on the alternate ineffective assistance claim, after having also denied relief on the *Cress* claim.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Mr. Johnson respectfully requests that this Court reverse the decisions below, grant relief from judgment and remand for a new trial.

Respectfully Submitted,

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